BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONALD L. FISHER Claimant	)	
VS.	)	Docket No. 1,057,789
OLATHE FORD SALES, INC. Respondent	)	
AND	)	
KANSAS AUTOMOBILE DEALERS WORK COMP FUND Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the December 29, 2011, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. James R. Shetlar of Overland Park, Kansas, appeared for claimant. Bill W. Richerson of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 28, 2011, preliminary hearing and exhibits thereto, and all pleadings contained in the administrative file.

ISSUES

Claimant alleges he injured his neck on August 27, 2011, when he lifted a pickup truck door while working in respondent's body shop. At the preliminary hearing, he requested medical treatment and temporary total disability (TTD) benefits. Respondent asserted that claimant's injury did not arise out of and in the course of his employment because of the enactment of L. 2011, Ch. 55, Sec. 5 which amended K.S.A. 2010 Supp. 44-508. Respondent argues subsection (f)(2) of L. 2011, Ch. 55, Sec. 5 provides that an injury is not compensable because work was a triggering or precipitating factor; nor is an

injury compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

Claimant had a previous neck injury and in 2005 underwent a discectomy and fusion at the C5-C6 and C6-C7 levels. A plate and screws were placed in claimant's cervical spine during surgery. The ALJ found claimant's current injury did not arise out of and in the course of his employment and, therefore, denied claimant's request for medical treatment and TTD benefits. Therefore, the issue is:

Did claimant sustain a personal injury by accident arising out of and in the course of his employment with respondent when applying the provisions of L. 2011, Ch. 55, Sec. 5?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

On March 2, 2005, claimant underwent a cervical discectomy and fusion at C5-C6 and C6-C7. As part of the surgery, a plate and screws were inserted into claimant's neck. For approximately a year after that surgery claimant had neck problems, including pain, swelling and headaches. In 2007, claimant returned to motor vehicle body work. He began working for respondent on March 1, 2009. Claimant testified that when he worked for respondent, he would lift parts weighing from 5 pounds up to 200 pounds. His job duties required him to work in awkward positions, stand, and turn and twist his body. Claimant indicated he had no problems completing his job duties or with his neck until the accident.

On August 27, 2011, claimant was working as a collision technician for respondent. He carried the door of a Ford F-150 pickup truck, which weighed 70-80 pounds, from the main shop to the body shop. While halfway to his destination, claimant felt something in his neck. His neck swelled up and "[t]he muscles and everything just knotted up and it was pretty intense."[1] Claimant testified the swelling was so severe that he found it nearly impossible to swallow and the pain extended into the middle of his back.

Claimant immediately reported the incident, and he was asked by respondent if he wanted to see a physician. Claimant decided to try and work the rest of the day, but the pain continued to get worse. Claimant testified the next day he was sent to Concentra by respondent where he eventually saw Dr. Harold Hess, a neurosurgeon.

[1] P.H. Trans. at 7.

Claimant saw Nurse Practitioner Genevieve K. Adams at Concentra on August 31, 2011. Her report from that visit indicates claimant completed a comprehensive questionnaire, which was not made part of the evidence. Based on that questionnaire, Ms. Adams determined claimant had a prior cervical disc surgery in 2005 with fusion at C5-C7. A plate and screws were inserted into claimant's neck. Cervical spine x-rays were taken, which revealed a questionable fracture of a screw at C5. A CT scan of the neck was also ordered. Ms. Adams' assessments of claimant on August 31, 2011, were cervical radiculopathy, cervical strain, and probable damage to cervical hardware.

Concentra's records indicate claimant saw Dr. Harold Hess on September 8, 2011. Claimant did not bring his x-rays and CT scans, but Dr. Hess did read the x-ray and CT reports. Dr. Hess' impression was "[p]robable cervical strain. It is extremely unlikely that his lifting injury at work 6 years after his original surgery would cause a fracture of the screw. This screw fracture is probably old."[2] Dr. Hess ordered a myelogram and another CT scan. Claimant requested to return to work and Dr. Hess allowed him to do so without restrictions.

Claimant testified that he tried to return to work on September 19, 2011, and he used a drill, causing his neck to swell. On the same day he went to Concentra, where he saw Ms. Adams.

Following the myelogram and second CT scan, claimant saw Dr. Hess on September 29, 2011. His impression after this visit was that claimant had a nonunion of C5-C6, which caused the fracture of the C5 screw. He indicated the fracture of the screw was related to claimant's 2005 surgery and not related to claimant's current injury. Dr. Hess' recommendation was that claimant see a physiatrist who would manage a course of rehabilitation. Dr. Hess indicated claimant insisted on seeing another neurosurgeon and that claimant was going to contact workers compensation to make such a request.

A Concentra record with no date of service shown indicated Dr. Hess diagnosed claimant with a cervical strain, cervicalgia, and neuralgia, neuritis and radiculitis, unspecified. Significant temporary restrictions were listed with a return-to-work date of September 29, 2011. The Concentra record noted claimant was referred to a physiatrist. It also stated the likely date claimant would reach maximum medical improvement would be January 26, 2012.

Claimant was seen at the request of his counsel by Dr. James A. Stuckmeyer, an orthopedic surgeon, on October 24, 2011. Dr. Stuckmeyer reviewed the records of Ms. Adams and Dr. Hess and reviewed the x-rays, CT scans and myelogram results, and

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[2] *Id.*, Cl. Ex. 2.

not merely the reports.[3] Claimant informed Dr. Stuckmeyer that prior to the August 27, 2011, accident he had symptoms of mild neck pain, but was able to maintain gainful employment that required a heavy lifting capacity. Dr. Stuckmeyer concurred with Dr. Hess that pseudoarthrosis existed at C5-C6 prior to the 2011 accident.

Dr. Stuckmeyer made the following comments in his report dated November 5, 2011:

> It would be the opinion of this examiner that it is speculative to state whether or not the screw fractured on the right at the C5 level is a result of the accident. This indeed represents a possibility. More concerning, from this examiner's point of view with expertise and background in spinal instrumentation and fusion, is that as a direct, proximate, and prevailing factor of the accident, when Mr. Fisher was picking up the truck doors, he disrupted this pseudoarthrosis at the C5-C6 level when he heard or felt the large pop in his neck with the development of radicular symptoms in the left upper extremity. . . .[4]
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> While the pseudoarthrosis, in this examiner's opinion, predated the accident date in discussion, it would be the opinion of this examiner that the accident of August 27, 2011, more likely than not disrupted this preexisting pseudoarthrosis, and the aforementioned treatment recommendations are indicated to cure and relieve Mr. Fisher of the symptoms which developed as a result of this work-related injury.[5]

On Friday, December 2, 2011, claimant worked for 40 minutes and sat around the rest of the day due to lack of work. The next day he hurt so badly he went to the emergency room at Phelps County Regional Medical Center (Phelps) in Rolla, Missouri. Cervical spine x-rays taken at claimant's December 3, 2011, emergency room visit revealed a broken screw. The records from Phelps provide little assistance on the issues of causation and whether claimant's injury arose out of and in the course of his employment with respondent.

Claimant was treated for his neck by neurosurgeon Dr. Paul O'Boynick. His complete medical records do not appear to be made part of the record as the record only contains return-to-work slips dated November 14 and December 12, 2011, and a report dated December 12, 2011. It appears claimant saw Physician Assistant Mark Pemberton with Dr. O'Boynick's office on December 12, 2011. The December 3, 2011, x-rays were

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[3] *Id.*, Cl. Ex. 5 at 2.

[4] *Id.*, Cl. Ex. 5 at 5.

[5] *Id.*, Cl. Ex. 5 at 6.

reviewed showing the fractured C5 screw. The report indicated claimant did not need surgery and that claimant would be kept off work until January 26, 2012.

The ALJ determined claimant's injury did not arise out of and in the course of his employment with respondent and stated in his Order:

> There were conflicting medical opinions as to whether this injury was caused by the work incident or the prior fusion procedure. The injury in this case was a disrupted pseudoarthrosis causing a broken screw in cervical fusion hardware. This kind of injury would only occur from lifting a car door where the worker had a prior cervical fusion. This type of injury therefore arose out of a risk personal to the claimant, and the prior fusion was the prevailing factor in causing this particular injury. For these reasons it is held the injury did not arise out of and in the course of employment and the claimant's requests for medical treatment and temporary total benefits are denied.[6]

PRINCIPLES OF LAW

The 2011 legislative session resulted in amendments to the Workers Compensation Act. L. 2011, Ch. 55, Sec. 1 provides in relevant part:

> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

L. 2011, Ch. 55, Sec. 5 provides in relevant parts:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
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> (f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

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[6] ALJ Order (Dec. 29, 2011) at 2.

> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> (B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
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> (3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
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> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
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> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
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> (iii) accident or injury which arose out of a risk personal to the worker; or
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> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
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> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

In their briefs, claimant and respondent cited the recent Board decision of *Yarbro*.[7] There, one of the issues was whether Yarbro's accident was the prevailing factor causing his injury. Yarbro, aged 70, was in a serious work-related motor vehicle accident that caused a cervical spine injury. Following the accident, Yarbro had an MRI which showed preexisting cervical problems. Before the accident, Yarbro did not have any cervical symptoms and had never obtained medical treatment for his cervical spine. The ALJ found and the Board Member affirmed that Yarbro's accident was the prevailing factor causing his injury.

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[7] *Yarbro v. First America*, No. 1,056,623, 2011 WL 6122928 (Kan. WCAB Nov. 22, 2011).

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[9]

ANALYSIS

There is no dispute that in 2005, claimant had his cervical spine fused at C5-C6 and C6-C7 and had a plate and screws inserted. Dr. Hess diagnosed claimant with a cervical strain and a fractured screw at C5. He also indicated claimant had a nonunion of C5-C6. He specifically indicated that the nonunion of C5-C6 caused the screw to break and this was not related to the accident on August 27, 2011.

Dr. Stuckmeyer indicated that the accident of August 27, 2011, "disrupted" claimant's preexisting pseudoarthrosis (a fibrous union) at the C5-C6 level. He indicated it would be speculation to say the screw was broken as a result of claimant's accident on August 27, 2011. The December 12, 2011, report by Mr. Pemberton with Dr. O'Boynick's office indicated claimant had a fractured screw at C5, but the limited report does not state whether the fractured screw was or was not the result of lifting the door.

Respondent is correct that in 2011, the Kansas Legislature placed new parameters on the definition of what constitutes a personal injury arising out of and in the course of employment. The fracture of the screw is a structural change and, therefore, constitutes a personal injury. However, claimant presented insufficient evidence to show the screw fractured as a result of claimant lifting the door. No physician opined that it was more probably true than not that the screw broke as a result of the accident. Claimant's own expert, Dr. Stuckmeyer, said it would be speculative to make such an assumption.

L. 2011, Ch. 55, Sec. 5 provides that an injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic. If a fact finder were to adopt Dr. Stuckmeyer's analysis that claimant had preexisting pseudoarthrosis, which was "disrupted" by the accident, claimant's injury would not be compensable. It is unknown what Dr. Stuckmeyer meant when he used the term "disrupted." Disrupted may or may not be synonymous with aggravated and/or exacerbated. This Board Member finds that claimant's fractured screw and any disruption of claimant's preexisting pseudoarthrosis are not compensable injuries as they did not arise out of or in the course of his employment with respondent.

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[8] K.S.A. 44-534a.

[9] K.S.A. 2010 Supp. 44-555c(k).

The ALJ did not address whether claimant's cervical strain arose out of and in the course of his employment. Dr. Hess diagnosed claimant with a cervical strain and Ms. Adams assessed the same. While Dr. Hess indicated it was unlikely that lifting the door caused the fractured screw, no such statement was made about claimant's cervical strain. No medical evidence was presented indicating the pain and swelling experienced by claimant was due solely to the disruption of the preexisting pseudoarthrosis and fractured screw.

Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.[10] Claimant was lifting a door between 70-80 pounds and felt immediate pain. His neck swelled and the pain extended into his upper back. On at least two occasions he returned to work for a short period of time. He then experienced swelling and pain in his neck and sought medical treatment and did not return to work. This Board Member finds claimant proved by a preponderance of the evidence that he sustained a cervical strain injury by accident arising out of and in the course of his employment with respondent and that the accident was the prevailing factor that caused claimant's cervical strain.

CONCLUSION

1. Claimant's fractured screw at C5 did not arise out of and in the course of his employment with respondent.

2. The disruption of claimant's preexisting pseudoarthrosis did not arise out of and in the course of his employment with respondent.

3. Claimant sustained a cervical strain injury by accident arising out of and in the course of his employment with respondent.

WHEREFORE, the undersigned Board Member affirms, in part, the December 29, 2011, preliminary hearing Order entered by ALJ Hursh by finding that claimant's fractured screw at C5 and the disruption of claimant's preexisting pseudoarthrosis did not arise out of and in the course of his employment with respondent. However, this Board Member reverses, in part, the December 29, 2011, preliminary hearing Order entered by ALJ Hursh by finding that claimant sustained a cervical strain injury by accident arising out of and in the course of his employment with respondent. This matter is remanded to the ALJ to issue further orders consistent with these findings.

IT IS SO ORDERED.

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[10] *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

Dated this ____ day of February, 2012.

THOMAS D. ARNHOLD
BOARD MEMBER

c: James R. Shetlar, Attorney for Claimant
Bill W. Richerson, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge